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No. 93-1935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,
Petitioner,

v.

FRANK C. SCHOONEJONGEN, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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MOTION OF NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37.4 of the Supreme Court Rules, the National Association of Securities and Commercial Law Attorneys ("NASCAT") hereby moves this Court for leave to file an *amicus curiae* brief in this case on behalf of Respondents. Counsel of record for Respondents have given NASCAT consent to file an *amicus curiae* brief in support of their position; however, counsel of record for Petitioner have refused to grant such consent.

As discussed at greater length in the Statement of Interest, NASCAT is an association of law firms consisting of attorneys located throughout the United States who represent parties in antitrust, consumer protection, employment, securities fraud and other types of commercial litigation. NASCAT and its members advocate the enactment and enforcement of effective federal and state laws to protect innocent persons, including consumers, investors, employees and retirees, from wrongful, deceptive and fraudulent conduct, including violations of the Employee

Retirement Income Security Act (ERISA). NASCAT's members currently represent thousands of employees and retirees in pending ERISA and state law class actions challenging termination and/or modification of company-funded health care benefits.

The *amicus curiae* brief which NASCAT seeks to file offers a broad perspective regarding the importance of this case and the potential impact of this Court's decision on thousands (if not millions) of employees and retirees. Thus, NASCAT's brief addresses the public policy and legal implications of a decision in this case on numerous persons who are not parties to this action.

For the reasons stated above, NASCAT respectfully requests leave to file its *amicus curiae* brief on behalf of Respondents in this case.

Respectfully submitted,

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QUESTIONS PRESENTED

Section 402(b)(3) of ERISA, 29 U.S.C. §1102(b)(3), requires every employee benefit plan to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." The questions presented are:

1. Whether Section 402(b)(3) is satisfied by a plan provision stating that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan."

2. Whether, in the absence of a plan-specified amendment procedure, any attempt by the sponsor to amend the plan is ineffective as a matter of law.

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

The National Association of Securities and Commercial Law Attorneys (NASCAT) is an association of law firms consisting of attorneys located throughout the United States who represent parties in antitrust, consumer protection, employment, securities fraud and other types of commercial litigation. NASCAT and its members advocate the enactment and enforcement of effective federal and state laws to protect innocent persons, including consumers, investors, employees and retirees, from wrongful, deceptive and fraudulent conduct, including violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1101. *et seq.*

NASCAT has an interest in this case because its members currently represent thousands of employees and retirees in pending ERISA and state law class actions challenging termination and/or modification of company-funded health care benefits. NASCAT and its members strongly advocate effective private enforcement of ERISA's statutory provisions and in developing case law that deters employers from violating its provisions and accompanying regulations to the detriment of employees and retirees. As *amicus curiae*, NASCAT respectfully submits that the decision of the Third Circuit in this case should be affirmed.

II. SUMMARY OF ARGUMENT AND PROCEEDINGS BELOW

A. The Third Circuit's Decision In This Case Should Be Affirmed

Compliance with the law is not too much to ask of Petitioner; this is all the Third Circuit did in correctly holding that an employee benefit plan must contain procedures for amendment and must identify those persons with the power to amend, as Section 402(b)(3) of ERISA, 29 U.S.C. §1102(b)(3), expressly requires. Absent such provisions, *any* attempt to amend the substantive terms of a plan is invalid.

This Court should affirm the Third Circuit's decision for several reasons. First, to give effect to Curtiss-Wright's attempted amendment to its employee benefit plan would vitiate Congress's mandate that plans expressly provide amendment procedures. As the Third Circuit correctly observed, under Curtiss-Wright's theory of the statute plan sponsors would be better off leaving out the required provisions so as not to be later hemmed in by their own strictures. This would encourage plan sponsors to disregard §402(b)(3), thereby rendering it ineffective. Congress cannot have intended that employers could so easily ignore this important statutory requirement.

Second, permitting companies to amend plan terms without following a specified procedure would undermine ERISA's goal of ensuring that participants are fully advised of (or can ascertain at any time) their rights under employee benefit plans. The lax amendment rule that Curtiss-Wright advocates would eliminate the certainty that ERISA's reporting, disclosure, fiduciary and writing requirements

were expressly designed to protect. Moreover, because employers have up to 210 days after the end of a plan year to inform participants of amendments, participants would have no roadmap to follow during that period to determine whether important changes were made unless the plans contain an express procedure for amendment and for identifying those with the power to amend, as ERISA expressly requires. Moreover, if companies were permitted to amend their plans without having to follow a particular procedure, it would be difficult for employees to express their views or challenge decisions to amend. Indeed, absent a clear identification of the locus of amending power, participants may become lost in referrals from one person or body to another.

Third, although it was the participants in Curtiss-Wright's plan who originally brought this action, ERISA's requirements regarding a formal amendment procedure serve to protect the employer and the plan as well because the amendment procedure and identification of persons with authority to amend help ensure accountability. In the words of the Ninth Circuit, "the writing requirement protects the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to such. . . ."[1] Requiring compliance with §402(b)(3) benefits *each* of the parties in the tri-partite ERISA

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[1] *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1523 (9th Cir.), *amended*, 1993 U.S. App. LEXIS 37236 (9th Cir. 1993); *accord Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 10 (2d Cir. 1992); *Rodrigue v. Western & Southern Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991).

relationship: the employer, the plan and the participants.

Curtiss-Wright advocates adopting a rule invalidating illegal amendments *only* if the absence of an amendment procedure causes *harm* to participants. However, this would place participants in the intolerable position of not knowing which provisions of their plans were valid or invalid at any given time. The same would be true if this Court were to adopt the view that illegal amendments should be invalidated only upon a showing of *detrimental reliance*, which Curtiss-Wright also proposes. Either rule could result in a plan having different meanings for different participants. If these proposed rules proposed were adopted there would be no certainty on the part of sponsors, administrators, or participants as to substantive amendments of a plan without years of litigation regarding whether there was "harm" or "detrimental reliance" in each instance.

Congress wisely avoided such a quagmire with the proverbial "ounce of prevention." ERISA mandates that plans specify a formal amendment procedure *in advance*, in the written plan documents. 29 U.S.C. §1102(b)(3). The plan must strictly abide by that procedure. 29 U.S.C. §1102(a)(1). A plan's failure to comply with these simple requirements makes the validity of any attempted modification unverifiable by sponsors, administrators and participants alike, thereby frustrating Congress's salutary goal.

Curtiss-Wright argues that affirming the Third Circuit's decision in this case would cause many (perhaps thousands of) plans to have to add presently non-existing amendment procedures. Yet, every time this Court clarifies a statute, those who are out of compliance

must change their practices. On the other hand, declining to enforce §402(b)(3) of ERISA, as Congress enacted, it would affect even more harshly the thousands (if not millions) of participants in those plans. They would be unable to ascertain the validity or substance of plan amendments and would, therefore, be uncertain about the operative terms of their plans.

Finally, notwithstanding Curtiss-Wright's protestations, the Third Circuit's decision is fully consistent with ERISA's comprehensive remedial scheme under several different theories of relief: (1) Under §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), the purported amendment could be deemed either arbitrary and capricious or simply a nullity, requiring enforcement of the pre-existing plan provisions; (2) under §502(a)(3)(A), 29 U.S.C. §1132(a)(3)(A), enforcement of the purported amendment could be enjoined as a violation of ERISA; and (3) under §502(a)(3)(B), 29 U.S.C. §1132(a)(3)(B), the participants could obtain traditional equitable relief either to restore them to the status quo ante -- that is, to put them in the position they occupied prior to the illegal amendment -- or to reform the plan document to eliminate the offending amendment. Each of these remedies is available under the plain language of ERISA's civil enforcement scheme.

B. The Proceedings In The Court Below

Both the district court and the Third Circuit rejected Curtiss-Wright's argument that its general reservation-of-rights clause satisfied the requirements of §402(b)(3) of ERISA, 29 U.S.C.

§1102(b)(3). As a result, the district court determined that the purported amendment taking away retirees' health benefits was invalid and the Third Circuit affirmed. *See Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1038-39 (3d Cir. 1994) (*Curtiss-Wright*).

In its opinion denying Curtiss-Wright's motion for certification of an interlocutory appeal, the district court reiterated its determination that the company had violated ERISA by failing to include in its plan a procedure for amendment. The district court concluded that benefit plans may not be amended by informal means, such as those based only upon a general reservations-of-rights clause, because the validity of plan amendments can *only* be determined by reference to particularized procedures required to be set forth in written plans. The district court struck Curtiss-Wright's attempted amendment because of the absence of such procedures and the resulting impossibility of evaluating and determining the propriety of the attempted amendment. *Id.* at 1039.

The Third Circuit agreed, affirming that Curtiss-Wright's reservation-of-rights clause failed to satisfy the requirements of ERISA §402(b)(3), 29 U.S.C. §1102(b)(3). The Third Circuit concluded that "[a] simple reservation of a right to amend is not the same as a 'procedure for amending [the] plan.'" *Id.* The court emphasized that a general reservation clause fails to further one of the primary purposes of §402(b)(3), which is "to ensure that all interested parties will know how a plan may be altered and who may make such alterations. Only if they know this information will they

be able to determine with certainty at any give time what the plan provides." *Id.* As a result, the Third Circuit held the attempted amendment invalid. *Id.* at 1038-39.

III. ARGUMENT

A. A Boilerplate Reservation-Of-Rights Clause Does Not Satisfy Section 402(b)(3) Of ERISA

Beginning in 1966, Curtiss-Wright Corporation provided its retirees with post-retirement health coverage. *Curtiss-Wright*, 18 F.3d at 1036. In September 1976, the company established the Post-Retirement Health Benefits Program in accordance with ERISA, which had recently become effective. Various letters and documents, including a "Constitution," provided that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." *Id.* at 1037. In 1983, relying entirely on this reservation clause as authority, Curtiss-Wright issued a new Summary Plan Description ("SPD") purporting to modify the plan by providing, for the first time, that a retiree's medical coverage under the plan would cease "upon termination of business operations of the facility" from which he or she retired. *Id.* Immediately thereafter, Curtiss-Wright closed one of its plants and, in accordance with the new provision, terminated the health benefits of workers who had retired from that plant. *Id.* at 1037-38.

Curtiss-Wright now asks the Court to hold that a boilerplate reservation-of-rights clause like the one included in its "Constitution" satisfies ERISA's mandatory requirement that

> Every employee benefit plan shall . . .
>
> (3) provide a *procedure* for amending such plan, and for identifying the persons who have authority to amend the plan. . . .

29 U.S.C. §1102(b)(3) (emphasis added). Because a general reservation-of-rights clause cannot satisfy §402(b)(3) of ERISA, this Court should affirm the Third Circuit's decision in this case. *See Curtiss-Wright*, 18 F.3d at 1038-39.

1. Modifying A Plan Without Following A Specified Procedure Would Violate ERISA And Undermine Its Goal Of Certainty

Curtiss-Wright contends that its generalized reservation clause satisfies ERISA's mandate that each plan set forth a procedure for amendment and for identifying the persons who have authority to amend. For the reasons stated by the courts below and for the reasons that follow, Curtiss-Wright is wrong.

If companies were able to satisfy their obligation under §402(b)(3) merely by including a generalized reservation clause (like Curtiss-Wright's) and were not required to follow a specifically delineated "procedure," they would undermine Congress's mandate that plan participants be apprised of and be able to effectively

challenge the sponsor's decisions regarding disqualification, ineligibility, or denial or loss of benefits. As emphasized by the Third Circuit, this would destroy one of ERISA's principal objectives – to ensure that participants are able to determine at any moment, by reviewing the plan documents, precisely what their rights and obligations are under employee benefit plans.

When enacting ERISA, Congress made clear that every employee benefit plan must be in writing and must include a procedure for amending the plan and for identifying those persons with the authority to amend. These requirements further Congress's goals that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan . . . [and] know who is responsible for operating the plan." H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077-78.[2] To permit companies the discretion to modify employee benefit plans in whatever manner they desire without requiring them to follow a specified procedure would eviscerate this statutory purpose and, as a result, participants would not know how their benefits could be modified and by whom, nor could they easily verify the terms of plans as modified.

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[2] *See also Schoonmaker v. Employee Sav. Plan of Amoco Corp.*, 987 F.2d 410, 413 (7th Cir. 1993) (quoting *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989)); *Miller v. Coastal Corp.*, 978 F.2d 622, 624-25 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1169 (3d Cir. 1990).

Affirming ERISA's primary purpose, courts have continuously sought to ensure that each participant be able to determine, by reviewing the plan documents, exactly what his or her rights are. For example, in *Algie v. RCA Global Communications*, 1994 U.S. Dist. LEXIS 4735, at *1-*2 (S.D.N.Y. April 12, 1994), former employees claimed entitlement to severance benefits under their previous employer's plan rather than benefits provided under its successor's plan. Expressly following the Third Circuit's ruling in *Curtiss-Wright*, the district court held that a simple reservation-of-rights clause does *not* satisfy §402(b)(3)'s requirement that an amendment procedure be included as part of each written plan. *Id.* at *7, *63-*68, *74-*75. The district court reasoned:

> The logic of this [*Curtiss-Wright*] analysis is compelling. The employer is required by ERISA to have a written plan and to specify a procedure for its modification in order "to ensure that 'every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.'"

Id. at *66-*67 (citing cases and legislative history). Even an effective, unambiguous reservation-of-rights clause simply does not serve this purpose.[3]

---

[3] Another example is provided by *Miller v. Coastal Corp.*, 978 F.2d at 624-25, in which the Tenth Circuit rejected an employee's claim that his retirement plan had been orally modified in a manner that would increase his benefits. The court ruled that plans may be modified only by following the formal written procedures, which §402(b)(3) requires be included in the plan, concluding that any other rule would prevent employees from being able to rely on plan documents and would, therefore, run afoul of one of

Under Curtiss-Wright's approach, the absence of an amendment procedure would permit companies to vary the terms of written plans via informal means because no controls would exist over the methods of amending. Such a practice would violate the well-established rule that plans cannot be modified either orally or by informal writings.[4] This settled rule is necessary to make certain that employees are fully advised of all of their rights under benefit plans. A contrary rule permitting companies to amend plans without explicit procedures in place necessarily erodes the certainty of plan terms which ERISA

ERISA's primary goals.

[4] *See, e.g., Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 137 (6th Cir.), *reh'g den'd*, 1993 U.S. App. LEXIS 20392 (6th Cir. 1993) (it is "a basic principle of ERISA that terms of a plan may not be modified or superseded by oral statements or other extrinsic evidence"); *Miller v. Coastal Corp.*, 978 F.2d at 624 ("[a]n employee benefit plan cannot be modified ... by informal communications ... regardless of whether those communications are oral or written; .... ERISA requires all modifications to an employee benefit plan to be written, 29 U.S.C. § 1102(a)(1), and to conform to the formal amendment procedures, 29 U.S.C. § 1102(b)(3)"); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993) ("[b]ased upon this statutory scheme [ERISA § 402(a)(1) and (b)(3)], any modification to a plan must be implemented in conformity with the formal amendment procedures and must be in writing[;] [o]ral or informal written modifications to a plan ... are of no effect"); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("[b]y explicitly requiring that each plan specify the amendment procedures, Congress rejected the use of informal written agreements to modify an ERISA plan[;] ... [r]eading the 'written agreement' provision of subsection 1102(a)(1) in light of subsection 1102(b)(3)'s requirement of formal written amendments procedures necessitates our conclusion that ... ERISA precludes oral modifications of employee benefit plans").

strives to ensure. Participants may not become aware of important amendments until well after they are adopted,[5] thereby shrouding plan terms in secrecy – especially if the plan illegally fails to identify the persons who have authority to amend.

Another important purpose served by §402(b)(3) of ERISA is to ensure that employees have sufficient information to enable them to express their views concerning amendments or challenge decisions to amend and amendments. *See, e.g., Siskind v. Sperry Retirement Program*, 795 F. Supp. 614, 617 (S.D.N.Y. 1992). In *Siskind*, the district court held that a committee of officers that had express authority to amend the plan improperly delegated that authority to others. In support of its refusal to permit the attempted delegation, the court explained that

> [t]he statutory requirement of designation of the locus of amending power is not a mere formality. Clear identification of the source of amendments is crucial so that employees will not become lost in referrals from one person or body to another if they seek to determine how to argue to -- or challenge the decisions of -- the person or entity making decisions about retirement benefits. . . .

Id. Merely providing that the "company" reserves the right to amend falls well short of clearly identifying "the source of amendments" because plan participants equipped with only this general identifier

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[5] Section 104(b)(1) of ERISA requires employers to communicate plan modifications to participants and beneficiaries "no later than 210 days after the end of the plan year in which the change is adopted. . . ." 29 U.S.C. §1024(b)(1).

will have unnecessary difficulty determining the locus of amending power.[6] Likewise, absent a formal amendment procedure, it would be difficult to determine the process and sequence of events culminating in the adoption of an amendment in order to determine its validity.

It is well-settled that if, as is required by statute, a plan provides a written procedure for amending plan terms and identifying the persons with authority to amend, that procedure *must* be followed.[7] If the expressed procedure is not followed, the plan may not be amended. It is illogical, not to mention patently unfair, to enforce a specified plan procedure that complies with ERISA while

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[6] Section 402(b)(3) is in the fiduciary responsibility part of the statute. *See* 29 U.S.C. §§1101-1114. In the process of enacting ERISA, Congress declared:

> [T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights. . . .

H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649. Absent a rule requiring that written plans contain specific procedures for amendment and for identifying those with the power to amend, employees will not "be armed with enough information to enforce their own rights." *Id.*

[7] *See e.g., Schoonmaker*, 987 F.2d at 413; *see also* Wm. T. Payne, *Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits*, 10 The Labor Lawyer 91, 101 (1994).

permitting companies like Curtiss-Wright to amend plans without conforming to a specified procedure, simply by virtue of including only a reservation-of-rights clause in their plans which does not comply with statutory requirements. The Third Circuit recognized that such a result "would render requirements of §402(b)(3) meaningless. . . ." *Curtiss-Wright*, 18 F.3d at 1038. Surely this would violate the settled rule that statutory provisions are to be construed so as to give them meaningful effect.[8] In this regard, the Southern District of New York recently stated:

> If an employer could modify a plan by any procedure in the absence of a specified plan procedure, it would in effect benefit by failing to comply with [§]402(b)(3), a result that would sabotage the statutory scheme and the underlying policy of full notice to plan participants.

Algie, 1994 U.S. Dist. LEXIS 4735, at *67. As a practical matter, if this Court were to rule that general reservation clauses satisfy §402(b)(3), in the future very few (if any) plans would contain a procedure for amendment and for identifying those with the authority to amend; such a ruling would simply write §402(b)(3) out of ERISA and out of existence. As emphasized by the Third Circuit, adopting

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[8] *See, e.g., U.S. ex rel. Harlan v. Bacon*, 21 F.3d 209, 210-11 (8th Cir. 1994). Simply put, courts are to construe statutes "so that no part will be inoperative or superfluous, void or insignificant." *Sekula v. FDIC*, 1994 U.S. App. LEXIS 31382, at *19 (3d Cir. Nov. 9, 1994); *accord Mears Transp. Group v. State of Florida*, 34 F.3d 1013, 1019 (11th Cir. 1994); *Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 587 (D.C. Cir. 1993).

the rule championed by Curtiss-Wright "would place those who violate §402(b)(3) . . . in a better position than those who comply . . . and would thereby discourage employers from complying with §402(b)(3)." *Curtiss-Wright*, 18 F.3d at 1040.

Courts have consistently refused to allow employers to benefit from their failure to comply with ERISA. For example, companies that offer plans and promise benefits thereunder to their employees are required to honor their commitments without regard to whether the plans have been reduced to writing as required by ERISA. *See, e.g., Donovan v. Dillingham*, 688 F.2d 1367, 1372-73 (11th Cir. 1982); *Sprague v. General Motors Corp.*, 857 F. Supp. 1182, 1190-92 (E.D. Mich. 1994). To provide such violators freedom from liability would turn ERISA's writing requirement on its head. In the same way, allowing employers such as Curtiss-Wright to amend plan terms in any way they choose due to the absence of any required written procedure for amendment would eviscerate §402(b)(3).

2. The Common Law Of Trusts Does Not Validate The Attempted Amendment

Curtiss-Wright and its *amici* attempt to convince this Court that, absent the required amendment procedures, it should look to the common law of trusts to determine the validity of attempted plan amendments. They are wrong. This Court has approved of looking to the common law to fill gaps in ERISA *only* when doing so effectuates Congressional policy concerns. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108-110 (1989); *Pilot Life*

Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987).[9] *Cf. U.S. v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (common law "may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress"). The common law precept that Curtiss-Wright proposes, however, flies directly in the face of ERISA. Curtiss-Wright and its *amici* argue that the power to amend a welfare benefit plan is inherently reserved to the employer and, therefore, the Petitioner is in the same position as a settlor at common law who has reserved the power to amend but not provided a method for exercising it. They contend that the following common law standard should control:

> [T]he settlor may, in the absence of a specified procedure, exercise the power to amend in any manner that sufficiently manifests his intention to modify the trust.

Restatement (Second) of Trusts §331 comment c (1959). *See generally* IV Austin W. Scott & William F. Fratcher, *The Law of Trusts*, §331 (4th ed. 1989). The problem with this analogy is its fatally flawed hypothesis. Curtiss-Wright is *not* in the same position as a settlor at

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[9] *See also Glass v. United Omaha Life Ins. Co.*, 33 F.3d 1341, 1347 (11th Cir. 1994) (in developing federal common law, courts "must adhere to the congressional policy concerns that inform ERISA"); *Tassinare v. American Nat'l Ins. Co.*, 32 F.3d 220, 225 (6th Cir. 1994) ("federal common law has only been fashioned when it is necessary to effectuate the purposes of ERISA") (interior quotation marks and original ellipsis omitted); *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 559 n.5 (4th Cir. 1994) (courts may develop federal common law of ERISA only to the extent it "is not inconsistent with congressional policy concerns").

common law who has reserved the power to amend but not provided a method for exercising it. The difference is that here, ERISA, a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 361, *reh'g denied*, 448 U.S. 908 (1980), *requires* that Curtiss-Wright specify a procedure for amending, whereas a settlor at common law has no such obligation.[10]

Curtiss-Wright's flawed hypothesis leads to an equally flawed conclusion. The statutory requirement that a plan specify an amendment procedure and then abide by it is patently inconsistent with the common law rule that a settlor can effectuate an amendment "in any manner that sufficiently manifests his intention" to do so.[11] The common law rule that Curtiss-Wright proposes is simply inapplicable to this case.

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[10] Of course, the circumstances under which a settlor may amend the trust and the methods by which he or she may amend it depend on the terms of the trust. The failure to follow the procedure(s) specified render such amendments or modifications invalid. *See, e.g., Northwestern Univ. v. McLoraine*, 438 N.E.2d 1369 (Ill. App. 1982); *In re Trust of Kaufmann*, 460 Pa. 24, 331 A.2d 209 (1975); *Restatement (Second) of Trusts* §331.

[11] *See Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1454 (4th Cir. 1992) (concurrence) ("[f]ederal common law does not provide a backdoor through which these statutory requirements [regarding plan amendments] may be evaded"); *National Cos. Health Ben. Plan v. St. Joseph's Hospital, Inc.*, 929 F.2d 1558, 1571 (11th Cir. 1991) (because ERISA addresses the matter, "a federal court could not create federal common law to apply to these [amendment] issues"). *See also Nachwalter*, 805 F.2d at 959 ("[a] federal court may create federal common law based on a federal statute's preemption of an area only where the federal statute does not expressly address the issue before the court") (citations omitted).

Had Congress wanted to provide for the right to amend "in any manner that sufficiently manifests [the] intention," *Restatement (Second) of Trusts* §331 comment c, it could easily have done so. It did not. Instead, Congress imposed a limitation on the right to amend, requiring that plans provide for and follow an express procedure. *See, e.g., Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2067 (1993) ("[t]hat limitation appears all the more deliberate in light of the fact that [a different rule] was well established under the common law of trusts"); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts are to "assume that Congress is aware of existing law when it passes legislation"). Thus, the common law rule advocated by Curtiss-Wright is inapplicable.

B. If A Plan Violates ERISA By Containing No Amendment Procedure, Substantive Amendments To The Plan Are Invalid

1. Congress And The Courts Routinely Rely On Adherence To Required Procedures To Promote Substantive Goals

Curtiss-Wright's and its *amici*'s expression of astonishment that the Third Circuit ordered what they call a "substantive" remedy for a "procedural" violation of the statute is itself astonishing. Such relief is commonly granted under ERISA, which is a statute dealing largely with plan administration, procedure and disclosure.[12] Indeed,

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[12] When enacting ERISA, Congress observed that

> [d]isclosure has been seen as a device to impart to

"[u]nder ERISA, . . . no great wall divides procedural from substantive violations." *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985). Ensuring proper compliance with procedure is one of the judiciary's best tools to promote substantive goals without becoming enmeshed in the merits of the particular goals – a task generally reserved for the legislative branch. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (minimum wage law was not "arbitrary or capricious, and that is all we have to decide").

The statutory requirement of an amendment procedure necessarily has substantive implications which renders demonstration of reliance or prejudice unnecessary. In *Blau*, 748 F.2d at 1353-56, the Ninth Circuit was particularly concerned that the absence of disclosure regarding the plan and of claims procedures rendered *any* decision to deny benefits arbitrary and capricious. The court stated that "[u]nder ERISA . . . no great wall divides procedural from substantive violations. Although reporting and disclosure requirements are arguably procedural, it is there procedural requirements that alter the very balance of knowledge and rights

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> employees sufficient information and data to enable them to know whether the plan was . . . being administered as intended. It was expected that the information disclosed would enable employees to police their plans.

H.R. Rep. No. 533, 93d Cong. 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

between covered employees and their employer." *Id.* at 1353. Correspondingly, Curtiss-Wright attempts to impute an interpretation to plan language never disclosed to participants which would enable it to deny benefits to them. The Ninth Circuit rejected this attempt in *Blau*, noting:

> [that] the evils against which ERISA was enacted to guard -- insecurity, lack of knowledge, and inability to plan administration – are just the evils that appear in Del Monte's administration of its plan.

Id. at 1356.

Much of ERISA is devoted to procedures for administration of plans. The statute does not require sponsors to offer employee benefit plans and it does not regulate welfare benefits that an employer may choose to offer. Once an employer decides to offer such benefits, however, ERISA is designed to ensure that the participants will actually receive the benefits promised. It does so through a multitude of requirements relating to plan administration, procedure and disclosure. The importance of compliance with ERISA's procedural requirements cannot be understated, as this is the manner in which Congress chose to protect plan participants and their beneficiaries. *See Firestone Tire*, 489 U.S. at 113 ("ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans'" (quoting *Shaw v. Delta*

Airlines, Inc., 463 U.S. 85, 90 (1983)).

2. Courts Often Remedy Procedural Errors With Substantive Relief

In the ERISA context, perhaps the best-known illustration of substantial consequences resulting from a lack of specified procedure is provided by the *Firestone Tire* case, where an ERISA plan was created by two sentences in an employment handbook. *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 146 (3rd Cir. 1987). The "plan document" at issue plainly lacked virtually all procedures that plans are required to contain. One consequence, this Court held, was that decisions of the plan fiduciaries were to be ignored in subsequent judicial proceedings. *Firestone Tire*, 489 U.S. at 115.

A common procedural error involving plan amendments is for a plan to be administered in accordance with oral or informal written modifications. As shown above, this is contrary to ERISA's requirement that plans be maintained pursuant to a written instrument and courts routinely invalidate such modifications, even if it means adversely affecting the plan as a whole. Another type of procedural error involving plan amendments occurs when a plan gives inadequate notice of material modifications. *See* 29 U.S.C. §1022(a)(1) (requiring participants to be apprised via SPD of any "material modification in the terms of the plan"). Under Department of Labor regulations, such notice must be "written in a manner calculated to be understood by the average plan participant" and must be accurate and comprehensive in describing the changes. 29 C.F.R.

§2520.104b-3; *see also* 42 Fed. Reg. 14,273 (Mar. 15, 1977) (SPD must be "comprehensive [and] accurate"). Failure to provide such notice can nullify (or make it arbitrary and capricious to give effect to) an attempted amendment.[13]

A third type of procedural error involving plan amendments occurs when a plan provides an amendment procedure, as required by §403(b)(3) of ERISA, but purports to adopt an amendment *without* complying with that process. Such amendments are ineffective to alter the terms of the plan.[14] The Third Circuit correctly reasoned in this case

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[13] *See Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 74 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989) (plaintiff restored to status quo ante where he "did not receive fair notice" of an amendment); *Baker v. Lukens Steel Co.*, 793 F.2d 509, 513 (3d Cir. 1986) (inadequate notice is a factor in determining whether an amendment is arbitrary and capricious); *Chambless v. Masters, Mates, and Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) ("the content of the notice regarding Amendment 47 was inadequate," which apparently contributed to court's ruling that amendment was arbitrary and capricious); *Valle v. Joint Plumbing Industry Board*, 623 F.2d 196, 203-04 (2d Cir. 1980) (in pre-ERISA plan, inadequate notice is one factor that can make an amendment arbitrary and capricious).

[14] *See Serrato v. John Hancock Life Ins. Co.*, 31 F.3d 882, 884 (9th Cir. 1994) ("the employer may modify or withdraw these benefits at any time, provided the changes are made in compliance with ... the terms of the plan" (citing *Doe v. Group Hospitalization & Medical Services*, 3 F.3d 80, 84 (4th Cir. 1993)) (emphasis added); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994) (court invalidated amendment for failure to comply with procedure, stating that "only representations adopted in accordance with the amendment procedures outlined in the formal plan documents will suffice"); *Law v. Ernst & Young*, 956 F.2d 364, 370 n.9 (1st Cir. 1992) (where a "plan provided that it could only be amended 'by action of its Management Committee[,] amendment allegedly adopted by members

that, given this rule, it would be anomalous indeed to give effect to purported modifications when the plan *fails* to provide an amendment process and thereby violates §402(b)(3). As the court below stated, this "would place those who violate §402(b)(3) . . . in a better position than those who comply . . . and would thereby discourage employers from complying with §402(b)(3)." *Curtiss-Wright*, 18 F.3d at 1040.

Another procedural error that can have dramatic substantive consequences occurs when an SPD is inadequate, either in its content or its distribution to participants. Under ERISA, plan administrators must furnish an SPD to each participant within 90 days after he or she becomes a participant and periodically thereafter. 29 U.S.C. §1024(b). The SPD must contain, *inter alia*,

> a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits;

29 U.S.C. §1022(b). Failure to adequately include these provisions often results in the *granting of benefits* that otherwise would have

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"through their individual actions" would be invalid).

been denied.[15] Another relatively common error arises from ERISA's requirement that SPDs must describe

> the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied. . . .

28 U.S.C. §1022(b). Failure to include this simple procedural language negates important protections that a plan otherwise would have, including the right of lay fiduciaries to interpret the plan and grant or deny claims subject only to limited judicial review (assuming the plan grants such discretion).[16] A plan can lose these same protections if it issues a denial

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[15] *See, e.g., Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 385-87 (9th Cir. 1994) (because SPD's "purported exclusion for pre-existing conditions is not conspicuous enough to attract the attention of a reasonable layman," the exclusion is unenforceable); *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1186 (3rd Cir. 1985) (due to inadequate notice in SPD of alternative elections, beneficiary of deceased spouse was awarded an amount that, with hindsight, was the greater of the two possible benefits: "[i]t is the employee's right to be informed of his rights ... that the Act is intended to protect").

[16] *See, e.g., Berger v. Edgewater Steel Co.*, 911 F.2d 911, 916 n.4 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991) ("there were no administrative remedies under the severance pay policy .... Thus, they could not exhaust their administrative remedies prior to seeking judicial relief"); *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993) ("exhaustion in the context of ERISA requires only those administrative appeals provided for in the relevant plan"); *Blau*, 748 F.2d at 1353 ("Del Monte's claims procedure fails simply because there was none"); *Thayer v. Alaska Teamster-Employer Pension Trust*, 16 Emp. Ben. Cas. 1877, 1880 (D. Alas. 1993) ("there were no procedural provisions for the type of review envisioned by 29 U.S.C. § 1132, and ... therefore, plaintiffs had no internal remedies to exhaust"); *Martin v. Marriott Corp.*, 15 Emp. Ben. Cas. 1217, 1222 (D.D.C. 1992) (without evidence that "plan

of benefits statement that does not meet the simple procedural requirements of §503, 29 U.S.C. §1133.[17]

Still another example of a procedural error resulting in substantive consequences involves the statutory provision that allows plan fiduciaries to allocate responsibilities among themselves in accordance with procedures set forth in the plan instrument. 29 U.S.C. §1105(b), (c). If the procedures are followed correctly, the delegating fiduciary is immune (with certain limited exceptions) from liability for the delegee's breaches. *Id.* However, such a delegation is invalid in the *absence* of plan procedures, or if the delegating fiduciary does not follow the plan procedures.[18]

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contained any remedies to be exhausted," doctrine is inapplicable); *Schwartz v. Interfaith Medical Center*, 715 F. Supp. 1190, 1193 (E.D.N.Y. 1989) (exhaustion inapplicable because "[t]here are ... no administrative remedies for plaintiffs to exhaust").

[17] *See, e.g., Vanderklok v. Provident Life & Acci. Ins. Co.*, 956 F.2d 610, 617 (6th Cir. 1992) ("[b]ecause defendant Provident failed to give appropriate notice, it is not entitled to the protections concerning administrative review") (original brackets omitted); *Leonhardt v. Holden Business Forms Co.*, 828 F. Supp. 657, 670 (D. Minn. 1993) ("[b]ecause the administrator failed to give appropriate notice, it is not entitled to the protections concerning administrative review"); *Dennis v. Sawbrook Steel Castings Co.*, 13 Emp. Ben. Cas. 1950, 1956 (S.D. Ohio 1991) (when "no beneficiary was ever given written notice of a specific denial," "it would be unjust to dismiss plaintiffs' claims in this action for failure to exhaust administrative remedies").

[18] *See, e.g., Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 584 (1st Cir. 1993) (where plan provides no "express procedures for the delegation of the Fiduciary's discretionary authority to a delegate," delegation of fiduciary duty fails pursuant to § 405(c)(1)); *Van Hoove v.*

3. The Relief That The Courts Below Granted Is Provided For Under ERISA's Civil Enforcement Provisions

The Third Circuit's ruling in this case meshes well with ERISA's "six [now eight] carefully integrated civil enforcement provisions found in §502(a) of the statute. . . ." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-147 (1985). The relief awarded to Respondents is available under several such provisions. First, under §502(a)(1)(B), a participant may sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . ." 29 U.S.C. §1132(a)(3)(A). The Third Circuit affirmed the district court's holding that the disputed amendment was not part of the plan by declaring the amendment a nullity or implicitly deeming it arbitrary and capricious. The court then enforced the remaining valid provisions of the plan, which is exactly what is contemplated in a suit for benefits under §502(a)(1)(B).

Second, under §502(a)(3)(A), participants may sue "to enjoin any act or practice which violates any provision of this subchapter or

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Mid-America Building Maintenance, 841 F. Supp. 1523, 1536 (D. Kan. 1993) (delegation invalid "because the policy instruments did not expressly provide a procedure for allocation" pursuant to § 405(c)(1)); *McManus & Pellouchoud, Inc. Employees' Profit Sharing Trust v. L.F. Rothschild, Unterberg, Towbin*, 1989 U.S. Dist. LEXIS 10098, at *3 (N.D. Ill. 1989) (delegation invalid because trust agreement "provides that the trustees, as named fiduciaries, can only delegate their fiduciary responsibilities to a third person in writing" and no such writing was ever made).

the terms of the plan. . . ." 29 U.S.C. §1132(a)(3)(B). The decision below could properly be characterized as an order preventing enforcement of the purported amendment. The amendment was adopted in violation of both ERISA and the terms of the plan, since the plan specified no amendment procedure.

Third, under §502(a)(3)(B), participants may sue "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . ." 29 U.S.C. §1132(a)(3)(B). Relying in part on ordinary principles of statutory construction, this Court recently held in a suit for money damages that "other appropriate equitable relief" provides for the recovery of "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 113 S. Ct. at 2069. This Court did *not* limit its construction of the statutory phrase "other appropriate equitable relief" *only* to injunctions, mandamus and restitution; rather, it identified those three remedies as *examples* of what was typically available in equity, indicating that traditional equitable relief is available under §502(a)(3)(B). *Id.*

At equity, restoration of a party to the status quo ante is a well-recognized form of relief. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 399 n.2 (1946) ("the court of equity may restore the status quo"). Thus, restoring Respondents to the position they occupied before Curtiss-Wright attempted illegally to amend the plan

-- namely, invalidating the amendment -- is well within the contours of §502(a)(3)(B) of ERISA.

Likewise, in the context of welfare benefit plans, "reformation of written instruments is also a form of equitable relief that entails the enforcement of agreements otherwise than as written." *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1300 n.3 (6th Cir.), *reh'g en banc denied*, 1991 U.S. App. LEXIS 26627 (6th Cir. 1991). "Reformation is not an incident to an action at law, but can be granted only in equity." *United States v. Milliken Imprinting Co.*, 202 U.S. 168, 173 (1906) (Holmes, J.). Thus, enforcing the Curtiss-Wright plan without the inclusion of the offending amendment was well within the court's authority under §502(a)(3)(B) of ERISA.

As demonstrated above, the Third Circuit's decision invalidating Curtiss-Wright's attempted amendment was proper under several of ERISA's civil enforcement provisions. Therefore, the court below adopted an appropriate remedy which is provided for under ERISA.

IV. CONCLUSION

The decision of this Court in this case will undoubtedly affect thousands (if not millions) of employees and retirees who bargained for and earned health care benefits in exchange for their years of labor. For the past twenty years, those innocent persons have placed their faith in ERISA as a statutory bulwark intended to protect them from arbitrary and unfair decisions and practices, such as those engaged in by Curtiss-Wright in this case, which necessarily endanger the security of their hard-earned retirements and accompanying benefits. In this case, the

Third Circuit properly enforced ERISA's clear and well-intended statutory provisions and found that Petitioner had violated them. Respondents (and the myriad of employees and retirees they necessarily represent in this case) ask for nothing more and are entitled to nothing less from this Court.

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